114

No. 08-439

Supreme Court, U.S.
FILED
DEC 2 - 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

MARCEL WINDT; E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.; JOHN A. MCMASTER; ROBERT S. WOODRUFF; JOSEPH P. NACCHIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

IRA A. FINKELSTEIN
HARNIK WILKER
& FINKELSTEIN LLP
645 FIFTH AVENUE
SUITE 703
NEW YORK, NY 10022-5937
(212)599-7575

Counsel for Respondent John A. McMaster

JONATHAN SHERMAN
Counsel of Record
JONATHAN M. SHAW
DEAN KAWAMOTO
MELISSA B. FELDER
BOIES, SCHILLER & FLEXNER LLP
5301 WISCONSIN AVENUE, N.W.
WASHINGTON, D.C. 20015-2015
(202)237-2727

Counsel for Respondent Qwest Communications International Inc.

December 2, 2008

(additional counsel listed on inside cover)

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

JEFFREY E. GROSS
VANDENBERG & FELIU
110 EAST 42ND STREET
SUITE 1502
NEW YORK, NY 10017
(212) 763-6800

Counsel for Respondent
Robert S. Woodruff

HERBERT J. STERN
JEFFREY SPEISER
JOEL M. SILVERSTEIN
STERN & KILCULLEN, LLC
75 LIVINGSTON AVENUE
ROSELAND, NJ 07068
(973) 535-9664

Counsel for Respondent
Joseph P. Nacchio

QUESTION PRESENTED

Whether, given this Court's repeated emphasis that the *forum non conveniens* analysis requires "flexibility" and that "each case turns on its facts," *certiorari* should be granted to review the decision below, which does not conflict with the decisions of other circuits, all of which properly recognize that the *forum non conveniens* analysis is sufficiently flexible to take into account *both* local *and* national considerations when appropriate on the facts of a given case?

RULE 29.6 STATEMENT

Qwest Communications International Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

Factual and Procedural Background 1

REASONS FOR DENYING THE WRIT 5

I. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY CASE DECIDED BY THIS COURT OR ANY OTHER COURT OF APPEAL. 7

A. The supposed conflict is premised on a mischaracterization of the Third Circuit's holding. 7

B. The supposed conflict is premised on a mischaracterization of the law in other circuits. 10

C. The decision below is consistent with this Court's *forum non conveniens* caselaw. ... 15

II. IN ANY EVENT, THE THIRD CIRCUIT'S RULING WAS CORRECT AND WOULD NOT CHANGE EVEN IF THE ANALYSIS FOCUSED EXCLUSIVELY ON THE CONNECTIONS BETWEEN THIS CASE AND THE UNITED STATES. 16

III. THERE IS NO POLICY REASON FOR THIS COURT TO GRANT REVIEW. 22

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

American Dredging Co. v. Miller,
510 U.S. 443 (1994) 16, 23, 24

Dahl v. United Techs. Corp.,
632 F.2d 1027 (3d. Cir. 1980) 19

De Melo v. Lederle Labs.,
801 F.2d 1058 (8th Cir. 1986) 12

DTEX, LLC v. BBVA Bancomer, S.A.,
508 F.3d 785 (5th Cir. 2007) 14

Esfeld v. Costa Crociere S.P.A.,
289 F.3d 1300 (11th Cir. 2002) 6, 11

Ford v. Brown,
319 F.3d 1302 (11th Cir. 2003) 11

Iragorri v. United Technologies Corp.,
274 F.3d 65 (2d Cir. 2001) 27, 28

Kamel v. Hill-Rom Co., Inc.,
108 F.3d 799 (7th Cir. 1997) 14

Koster v. (American) Lumbermens Mut. Cas. Co.,
330 U.S. 518 (1947) 15, 16

Lacey v. Cessna Aircraft Co.,
932 F.2d 170 (3d Cir. 1991) 20, 21

Marathon Oil Co. v. Ruhrgas,
145 F.3d 211 (5th Cir. 19[illegible]3) 10

Mercier v. Sheraton Int'l, Inc.,
981 F.2d 1345 (1st Cir. 1992) 13, 14

Mercier v. Sheraton Int'l, Inc.,
935 F.2d 419 (1st Cir. 1991) 6, 12, 13, 21

Monrosa v. Carbon Black Export, Inc.,
359 U.S. 180 (1959) 17

Morrison v. Nat'l Australia Bank Ltd.,
__ F.3d. __, No. 07-0583-cv,
2008 WL 4660472 (2nd Cir. Oct. 23, 2008) ... 24

Pain v. United Technologies Corp.,
637 F.2d 775 (D.C. Cir. 1980) 15, 28

Paolicelli v. Ford Motor Co.,
No. 06-13688, 2008 WL 3855042
(11th Cir. Aug. 20, 2008) (slip copy) 11

Pastewka v. Texaco, Inc.,
565 F.2d 851 (3d Cir. 1977) 10

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 7, 15, 21, 22, 24

Pollux Holding Ltd. v. Chase Manhattan Bank,
329 F.3d 64 (2d Cir. 2003) 19, 27

Reid-Walen v. Hansen,
933 F.2d 1390 (8th Cir. 1991) 6, 11, 12, 28

Rustal Trading US, Inc. v. Makki,
17 Fed. Appx. 331 (6th Cir. 2001) 14

Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.,
127 S.Ct. 1184 (2007) 24

Smith Kline & French Labs. Ltd. v. Bloch,
(1983) 1 W.L.R. 730 (Eng. C.A.) 23

Van Cauwenberghe v. Biard,
486 U.S. 517 (1988) 18

Van Schijndel v. Boeing Co.,
263 Fed. Appx. 555 (9th Cir. 2008) 14

Villar v. Crowley Maritime Corp.,
990 F.2d 1489 (5th Cir. 1993) 10

Watt v. Alaska,
451 U.S. 259 (1981) 17

STATUTES

11 U.S.C. § 1504 25

11 U.S.C. § 1509 ..... 25, 26

18 U.S.C. § 1964(c) 18

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8 § 1501, 119 Stat. 23 (2005) 25

Private Securities Litigation Reform Act of 1995, Pub. L. 104-67 § 107, 109 Stat. 737 (1995) ... 18

OTHER

INSOL-Europe Executive, Council & Secretariat, http://www.insol-europe.org/aboutus/executivecouncil.cfm (last visited Nov. 26, 2008) 23

Houthoff Buruma, http://www.houthoff.com/index.php?id=122&suggest=kpnqwest&t=6 (last visited Nov. 26, 2008) 23

Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop, and Edward A. Hartnett, *Supreme Court Practice* (9th ed. 2007) 17

STATEMENT OF THE CASE

The Third Circuit's decision below does not conflict with the decision of any other circuit or with any case decided by this Court. Rather, it presents an unremarkable application of settled *forum non conveniens* law in the context of a Dutch-centered dispute involving parties embroiled in related proceedings in the Netherlands. There is no tension between the Third Circuit's decision and U.S. treaty obligations, which Petitioners did not raise in the district court, and which would not have produced a different outcome if they had.

Factual and Procedural Background

Petitioners are the Dutch representatives of the estate of KPNQwest N.V. ("KPNQwest"), a Dutch telecommunications company headquartered in the Netherlands that did business throughout Europe. KPNQwest was created in 1999 through a joint venture between subsidiaries of Respondent Qwest Communications International Inc. ("Qwest") and Koninklijke KPN N.V. ("KPN"). KPN, which was partly owned by the Dutch government, provided KPNQwest with its infrastructure and numerous employees.

Originally, KPNQwest's Supervisory Board seats were split evenly between nominees from KPN and Qwest. KPN nominated Dutch employees of KPN or its subsidiaries; Qwest's initial nominees were Respondent Nacchio and two other Qwest employees. KPNQwest's board named Respondent McMaster the company's CEO, and he moved to the Netherlands to accept the position.

In 2002, a European telecommunications market crash forced KPNQwest to file for bankruptcy protection in the Netherlands.

Two years later, Petitioners sued Colorado-based Qwest; Woodruff, a Coloradan who served on KPNQwest's Supervisory Board; Nacchio, a New Jersey resident who served on KPNQwest's Supervisory Board; and McMaster, now a New Jersey resident who was KPNQwest's CEO. Although they are Dutch and have neither professional nor personal contacts with the United States or New Jersey, Petitioners filed suit in the District of New Jersey. They asserted two types of claims: (1) Dutch law claims for mismanagement and breach of fiduciary duty under eleven Dutch Civil Code sections, and (2) a RICO claim, alleging that defendants induced KPNQwest to use misleading accounting methods to inflate the prices of Qwest and KPNQwest stock and to sell Qwest stock at inflated prices.[1] *See* Pet. App. at 4a-5a, 70a-71a.

Respondents timely moved to dismiss on *forum non conveniens* grounds, arguing that this Dutch-centered lawsuit belonged in the Netherlands, which, by contrast with Petitioners' chosen forum, has substantial contacts with, and interest in, the parties' dispute. *Id.* at 43a-46a. In addition to the lion's share of the witnesses and documents, the Netherlands was

---

[1] Petitioners' RICO claim, their sole American law claim, is barred under the PSLRA's RICO bar. *See* note 9, *infra*. The issue was briefed, but not reached, below; the lower courts found that this case belonged in the Netherlands even assuming a viable RICO claim.

also home to related proceedings involving all parties to this action and many other entities, including:

- An action brought by Dutch KPNQwest shareholders in the Enterprise Chamber, a branch of the Civil Court in Amsterdam with jurisdiction over corporate mismanagement claims. All parties to this case, plus KPN, KPN's nominees to KPNQwest's board, and others are involved in this proceeding. *See id.* at 44a-45a.

- A "significantly related" lawsuit filed by KPNQwest lenders against Qwest, Nacchio, McMaster, KPN, and others, that "involve[s] some of the same issues as this litigation." *Id.* at 30a.

- Insurance litigation that "names all of the individuals in this lawsuit and contains many of the same issues raised in this litigation." *Id.* at 31a.

And Respondents' "pursuit of contribution claims would result in additional, related litigation in the Netherlands." Pet App. at 25a.

The district court dismissed. After finding the Netherlands an adequate forum (which was not contested), the district court considered how much deference to accord Petitioners' forum choice. Because Petitioners are foreign, the district court conducted a convenience analysis to determine the level of deference. Although Petitioners did not brief the issue, the district court independently searched the record for evidence of convenience. Finding little, it accorded

Petitioners' forum choice a "low degree of deference." *Id.* at 56a-61a.

The district court then analyzed the public and private interest factors. It found that the public interest factors "heavily favor[]" dismissal because: (i) neither New Jersey nor the United States had a strong interest in this case alleging fraud against, and mismanagement of, a Dutch company by its own board members, CEO, and stockholder; (ii) U.S. courts and New Jersey jurors would be unnecessarily burdened by a case with no connection to or impact on New Jersey; and (iii) the Netherlands had a strong interest. Pet. App. at 67a-72a. The district court found that the balance of the private interest factors also "unambiguously" favors dismissal primarily because concentrating all related litigation in the Netherlands promised to maximize witness convenience and judicial economy. *Id.* at 78a-81a.

Finally, the district court concluded that litigating these Dutch-centered claims in New Jersey rather than in Petitioners' home forum would be "oppressive or vexatious" considering: (1) the related Dutch proceedings involved the parties and many relevant third-parties; (2) certain third-parties could be sued for contribution only in the Netherlands; (3) maintaining actions in two different countries would increase unnecessarily the burdens of the litigation; and (4) maintaining litigation in the U.S. would require translation of documents and testimony in Dutch. *Id.* at 80a-84a.

In opposing the motion to dismiss in the district court, Petitioners did not brief or argue the following issues discussed in their Petition: (1) their claim on

appeal that they chose to file in New Jersey for reasons of convenience; (2) that any treaty affected the *forum non conveniens* analysis in any way; and (3) that transfer pursuant to 28 U.S.C. § 1404(a) should be considered as an alternative to dismissal.

Petitioners appealed the dismissal to the Third Circuit, which affirmed, holding that:

> the District Court did not abuse its discretion in according the Trustees' forum choice a low degree of deference, that the District Court did not abuse its discretion in balancing the public and private interest factors, and that the District Court did not abuse its discretion in determining that continuing with this lawsuit in New Jersey would be oppressive or vexatious to the Defendants out of all proportion to the convenience of the Trustees.

Id. at 32a.[2] The Third Circuit denied Petitioners' petition for rehearing. Pet. App. at 36a.

REASONS FOR DENYING THE WRIT

The Petition is premised on the assertion that the Third Circuit decision below conflicts with certain decisions of other circuits and this Court. That

---

[2] Because it affirmed dismissal of the case, the Third Circuit dismissed as moot Respondents' contingent cross-appeal of the district court's denial of a motion to compel arbitration. Pet. App. at 32a. To preserve that issue, Respondents filed a conditional Cross-Petition for Writ of Certiorari, which has been docketed in this Court as No. 08-614.

supposed conflict rests entirely on a mischaracterization of the relevant cases.

The Third Circuit held that the *forum non conveniens* analysis is sufficiently flexible to permit courts to consider *both* national *and* local factors as appropriate on the facts of a particular case. Petitioners contend that conflicting caselaw holds that courts must look *exclusively* at national factors, and may not consider local ones.

But two of the three cases that Petitioners claim conflict with the decision below — *Esfeld v. Costa Crociere S.P.A.*, 289 F.3d 1300 (11th Cir. 2002), and *Reid-Walen v. Hansen*, 933 F.2d 1390 (8th Cir. 1991) — are inapposite. Neither decision even considered whether the *forum non conveniens* analysis is sufficiently flexible to take into account both local and national factors, much less decided it is not. In other cases, the Eleventh and Eighth Circuits have made clear that they consider both national and local factors.

Petitioners' interpretation of the third case on which they rely — *Mercier v. Sheraton Int'l, Inc. ("Mercier II")*, 935 F.2d 419 (1st Cir. 1991) — was expressly rejected by the First Circuit itself in a subsequent opinion in the same case that Petitioners have inexplicably failed to cite. In that later opinion, the First Circuit enunciated precisely the same standard as that applied by the Third Circuit below.

Thus, there is no circuit split. Nor is there any conflict between the analysis applied below and any decision of this Court, which has repeatedly emphasized that the *forum non conveniens* analysis

requires "flexibility" and that "each case turns on its facts." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (quotation and citation omitted).

Finally, the issue that Petitioners present does not merit review because the Third Circuit's decision was correct and would not change even if the analysis did not consider the absence of local New Jersey interest in this case. And there is no public policy reason for this Court to review the lower court's fact-bound decision or to address issues and arguments that were not presented to the district court in the first instance.

I. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY CASE DECIDED BY THIS COURT OR ANY OTHER COURT OF APPEAL.

Despite Petitioners' contentions, there is no conflict among the courts of appeal and no conflict between the decision below and decisions of this Court.

Petitioners' claim of circuit conflict rests on a mischaracterization of both the Third Circuit's decision and decisions from other courts of appeal that supposedly conflict with it. It also ignores more pertinent authority from those same circuits endorsing precisely the analysis employed below. And nothing in that analysis conflicts with any holding of this Court.

A. The supposed conflict is premised on a mischaracterization of the Third Circuit's holding.

Federal *forum non conveniens* analysis requires courts to compare (1) the convenience of litigating in a

foreign country with (2) the convenience of litigating here. Petitioners incorrectly contend that the Third Circuit held that the inquiry should "focus on the convenience of proceeding in New Jersey," and "ignored the Trustees' showing of convenience in the United States." Pet. at 10.

The Third Circuit did not "ignore" the potential convenience of proceeding in the United States. Rather, it held that the district court did not abuse its discretion when, on the facts of this case, it considered *both* this case's tenuous relationship to New Jersey *and* its equally tenuous relationship to the United States as a whole: "Although the relationship between the United States and a case generally should be considered, this does not mean that the relationship between the local federal court district and the case should not." Pet. App. at 16a.

Petitioners also fail to acknowledge that the Third Circuit considered not only this case's lack of connections to New Jersey, but also its lack of connections to the United States as a whole. Specifically, the Third Circuit approved the district court's conclusion that the tangential connections of this Dutch-centered dispute to the United States "'cannot transform the case into an "American" dispute.'"[3] *Id.* at 19a. It also expressly weighed (1)

---

[3] The district court likewise emphasized that this case has no substantial relationship with *either* New Jersey *or* the United States as a whole. *See, e.g.*, Pet. App. at 57a ("Plaintiffs, Dutch attorneys appointed by a Dutch court to act as bankruptcy trustees for a Netherlands-based entity, are indeed foreign plaintiffs that have neither personal or business contacts with the United States or the State of New Jersey"); *id.* at 67a ("The fact

other lawsuits filed in other U.S. forums and (2) the national interest of the United States in redressing the allegedly wrongful conduct of an American corporation and American executives. *Id.* at 22a, 31a. But it found all of those factors outweighed by, among other things, the far stronger interest of the Netherlands[4] and the oppression and vexation inherent in forcing defendants to litigate related proceedings simultaneously in both forums. *See, e.g., id.* at 15a, 20a, 25a, 27a-29a.[5]

---

that two of these defendants are domiciled in the state of New Jersey does not transform the case into a 'local dispute,' same as the facts that four Board meetings took place somewhere in the United States and Defendants, while being present in the United States, took part in five international conference calls, cannot transform the case into an 'American' dispute."); *id.* at 68a ("the United States and the community of the District of New Jersey have little interest in the resolution of this case").

[4] Significantly, in its *amicus* brief the Kingdom of the Netherlands does not assert either that the lower courts incorrectly assessed its "substantial" interest in this case or even that this case belongs in the United States; the Kingdom focuses instead solely on a treaty that Petitioners did not rely on below and that, as explained below, would not change the result in any event.

[5] Petitioners also incorrectly assert that the Third Circuit "held that it could not make a determination as respects the United States as a whole" and that, therefore, "it remains for the Trustees to re-file elsewhere and test *forum non conveniens* issues anew in that other district." Pet. at 16. Rather, in rejecting Petitioners' position that *any* consideration of local conditions is forbidden, the Third Circuit recognized, in dictum, that local considerations might, in an appropriate case, weigh heavily in the analysis. Pet. App. at 16a. But, contrary to Petitioners' argument, the court did

B. The supposed conflict is premised on a mischaracterization of the law in other circuits.

Petitioners purport to find a circuit split by comparing their misreading of the Third Circuit's holding with what they contend are conflicting holdings of the First, Eighth, and Eleventh Circuits. According to Petitioners, each of those courts has held that the "the forum comparison should be *exclusively*

---

not conclude that this was such a case. Instead, it emphasized only that the scope of the preclusive effect to be accorded its decision was not before it. *Id.* ("Thus, the conclusion we reach in this case does not *necessarily* mean that this action may not be maintainable in another federal district.") (emphasis added).

Nor is that issue before this Court. If Petitioners were to re-file this suit in another district, ordinary preclusion principles would compel a prompt dismissal, in view of the findings below that there is no significant *American* interest in this lawsuit and that related proceedings in the Netherlands, which has a strong interest in this case, renders simultaneous trans-Atlantic litigation oppressive and vexatious. Successive filings have been dealt with in precisely that way for decades without causing any of the problems that Petitioners warn against. *See, e.g., Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1498 (5th Cir. 1993) ("a plaintiff may not relitigate a *forum non conveniens* issue [already decided in another district court] unless he can show some objective facts that materially alter the considerations underlying the previous resolution") (quotation and citation omitted), *abrogated on other grounds by Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998); *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 853 (3d Cir. 1977) (holding that a *forum non conveniens* determination in New York federal district court precluded relitigation of the issue in a Delaware federal district court where the Second Circuit had concluded that England was the most appropriate forum).

between the United States and the foreign country." Pet. at 29-30 (emphasis in original).

Petitioners' statement of the holdings of those courts is flatly wrong. None of those courts — nor any other — has so held.

The Eleventh and Eighth Circuit cases on which Petitioners rely — *Esfeld*, 289 F.3d 1300 and *Reid-Walen*, 933 F.2d 1390 — are inapposite and do not conflict with the decision below. Neither even purported to decide whether the flexible *forum non conveniens* analysis permits consideration of *both* local and national factors; the out-of-context snippets on which Petitioners rely are dictum stated in the course of resolving the very different questions before those courts.

In *Esfeld*, the Eleventh Circuit decided whether, in a diversity case, the *forum non conveniens* analysis was governed by state or federal law. 289 F.3d at 1306. *Esfeld* did not hold, as Petitioners claim, that "the forum comparison should be *exclusively* between the United States and the foreign country." Pet. at 29-30 (emphasis in original). That issue was not before the Eleventh Circuit in that case. But later cases confirm that, like the Third Circuit, the Eleventh Circuit considers *both* local and national factors in the *forum non conveniens* analysis. *See, e.g., Paolicelli v. Ford Motor Co.*, No. 06-13688, 2008 WL 3855042, at *3 (11th Cir. Aug. 20, 2008) (slip copy) ("juries in the three countries as opposed to jurors that live in the Southern District of Florida, have a greater interest in and connection to the accidents."); *Ford v. Brown*, 319 F.3d 1302, 1309-10 (11th Cir. 2003) (although relevant evidence was located in Texas, Florida was an

inconvenient forum because, *inter alia*, "most of the evidence in this litigation is in Hong Kong, while some witnesses are in England and others are in Texas. Florida is relevant only because one alleged Exxon employee, defendant Brown, happened to live in Florida at the time Plaintiff took a notion to sue. Of all possible forums, Florida is unquestionably the worst.").

Reid-Walen is similarly inapposite, since the Eighth Circuit likewise did not even consider whether "the forum comparison should be *exclusively* between the United States and the foreign country," Pet. at 29-30 (emphasis in original), much less hold that it should. Rather, the out-of-context language on which Petitioners rely relates to the court's holding, which is inapplicable here, that a U.S.-resident, American citizen suing in a federal district in which she does not reside is nonetheless entitled to the deference due a plaintiff suing in her home forum. *Reid-Walen*, 933 F.2d at 1394 ("the 'home forum' for the [U.S.-resident] plaintiff is any federal district in the United States, not the particular district where the plaintiff lives."). Like the Third Circuit, the Eighth Circuit also considers both national and local interests in the *forum non conveniens* analysis when appropriate on the facts of a particular case. *See, e.g., De Melo v. Lederle Labs.*, 801 F.2d 1058, 1063 (8th Cir. 1986) ("The only states that have any material connection to this litigation are New York and New Jersey. There simply is no justification for adding to the local docket in Minnesota or imposing jury duty on Minnesota residents on a matter which affects the forum and its residents in such a minimal fashion.").

As for *Mercier v. Sheraton Int'l, Inc.* (*"Mercier II"*), 935 F.2d 419 (1st Cir. 1991), the Petitioners

inexplicably failed to acknowledge a subsequent opinion in that same case in which the First Circuit expressly rejected the reading of *Mercier II* on which Petitioners have premised their claimed conflict:

> *Mercier II* did not state that a district court could not recognize, as a factor to be considered in its forum non conveniens analysis, the attenuated connection between the matter in litigation and the *particular forum* selected within the United States. Rather, we pointed out that the connection between the matter in litigation and the particular forum within the United States may not wholly *supplant* the dominant transnational comparison required where "the choice facing the district court [is] between two *countries*." Provided adequate recognition is accorded "the substantial public interest in providing a convenient United States forum for an action in which all parties are United States citizens and residents," the trial court may weigh, as a subsidiary consideration, any attenuated connection between the particular United States forum and the matter in litigation.

Mercier v. Sheraton Int'l, Inc. ("Mercier III"), 981 F.2d 1345, 1355 (1st Cir. 1992) (citations omitted, emphasis in original), *cert. denied,* 508 U.S. 912 (1993). Thus, contrary to what Petitioners contend, the First Circuit did *not* hold that "the forum comparison should be *exclusively* between the United States and the foreign country" Pet. at 29-30 (emphasis in original); instead, it expressly rejected that proposition.

Thus, the First, Eighth, and Eleventh Circuits do not hold that the *forum non conveniens* analysis must focus exclusively on national factors. To the contrary, they agree with the court below that in appropriate cases *both* local and national factors are relevant in the *forum non conveniens* analysis. Because these courts and the Third Circuit are in complete accord on this issue, there is no conflict among the courts of appeal[6]

---

[6] Petitioners also cherry-pick language from Ninth and D.C. Circuit opinions that they contend obliquely support their position. Pet. at 32. Again, however, the cases cited do not conflict with the Third Circuit's holding. Rather, as the First Circuit recognized in *Mercier III*, both the Ninth and the D.C. Circuits espouse the same flexible approach as the First, Third, Eighth, and Eleventh Circuits. *Mercier III*, 981 F.2d at 1355 (collecting cases). Indeed, the courts of appeal regularly find the *forum non conveniens* analysis sufficiently flexible to take local considerations into account when the facts of a particular case warrant. *See, e.g., Van Schijndel v. Boeing Co.*, 263 Fed. Appx. 555, 557 (9th Cir. 2008) (holding that district court properly considered both the case's lack of connection to California and its lack of connection to the United States); *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 799, 802 (5th Cir. 2007) (affirming and adopting as the opinion of the court of appeals the district court's opinion holding that, although the plaintiff was a U.S.-resident, American citizen, the "facts of this case have no connection with Texas"); *Rustal Trading US, Inc. v. Makki*, 17 Fed. Appx. 331, 338 (6th Cir. 2001) ("the relationship between the Eastern District of Michigan and the underlying dispute in this case is tenuous at best"); *Kamel v. Hill-Rom Co., Inc.* 108 F.3d 799, 804-05 (7th Cir. 1997) ("Here . . . we have a foreign plaintiff who was injured in a foreign land filing suit against an American defendant with extensive foreign dealings. The district court thus made a permissible inference that Indiana residents have a mere

and, thus, no reason for this Court to grant review here.

C. The decision below is consistent with this Court's *forum non conveniens* caselaw.

Petitioners also assert that this Court's decision in *Piper*, 454 U.S. 235, "reflect[s]" — not "holds" — that the *forum non conveniens* analysis should focus exclusively on the convenience of proceeding in the United States. Pet. at 14-15, 32. Here, too, Petitioners are incorrect. Petitioners' strained argument, Pet. at 32, that this Court's use of the adjectives "American" and "Scottish" — rather than "Pennsylvanian" and "Scottish" — was intended to convey that courts must consider *only* national interests, assigns undue weight to a word choice not material to any issue before this Court in that case.

Certainly, no court has found such a bright-line rule in *Piper* or in this Court's other *forum non conveniens* decisions. Such a rule would be inconsistent with this Court's emphasis on the need to retain "flexibility." *Piper*, 454 U.S. at 249. This Court has consistently eschewed *per se* rules, emphasizing instead that "each case turns on its facts." *Koster v.*

---

passing interest in this case."); *Pain v. United Technologies Corp.*, 637 F.2d 775, 792 (D.C. Cir. 1980) (recognizing contacts with the United States but holding that: "[s]ince this controversy has no relation whatever to the forum chosen by the plaintiffs[,] the District of Columbia[,] the district judge was entirely justified in dismissing the case. . . . jury duty for this matter ought not be imposed upon the people of the District of Columbia, nor should local dockets be clogged by appeals in this case"), *abrogated on other grounds by Piper*, 454 U.S. 255.

(American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 528 (1947) (quotation omitted); *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (noting that "uniformity and predictability of outcome" is almost impossible in the *forum non conveniens* context because of the "multifariousness of the factors relevant to its application"). Moreover, this Court has emphasized "the local nature of the 'public factors' relevant to the *forum non conveniens* determination." *Am. Dredging*, 510 U.S. at 456 (citation omitted).

The Third Circuit's holding that it was appropriate for the district court to consider *both* the lack of New Jersey interest *and* the lack of any significant national interest in this lawsuit was based on its analysis of the particular facts of this case and is thus in harmony with the decisions of other circuits and fully consistent with this Court's *forum non conveniens* cases.

II. IN ANY EVENT, THE THIRD CIRCUIT'S RULING WAS CORRECT AND WOULD NOT CHANGE EVEN IF THE ANALYSIS FOCUSED EXCLUSIVELY ON THE CONNECTIONS BETWEEN THIS CASE AND THE UNITED STATES.

Just as there is no circuit split and no inconsistency with this Court's decisions that justify review, there are also no "compelling reasons" to grant the Petition. The greater deference the Petitioners seek for their choice of forum would not change the conclusion that this Dutch-centered case belongs alongside the related

proceedings in the Netherlands. That is further reason to deny the Petition.[7]

The Petition asserts, in essence, that the Third Circuit afforded Petitioners' forum choice too little deference when it held that "the District Court properly and thoroughly considered the particular circumstances presented by this litigation," and did not "abuse[] its discretion in determining that the balance of the public and private interest factors clearly favored dismissal." Pet. App. at 25a. Petitioners assert that they should have received the highest level of deference,[8] implicitly suggesting that greater deference would have led to a different result. This is wrong for at least two reasons.

---

[7] *See, e.g.*, Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop, and Edward A. Hartnett, *Supreme Court Practice* 248 (9th ed. 2007) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."); *cf. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."); *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals.").

[8] The basis for Petitioners' claim to greater deference is what they contend — without citation to the record other than to an affidavit showing that *some* witnesses were in the United States — was a showing that their decision to file this case in the United States was driven by convenience rather than forum-shopping. Pet. at 19-21. Petitioners do not cite to the record because they failed to brief the issue of convenience, or to make any record of the reasons for their forum choice, in the district court and thus made no such showing below.

First, the opinions below did not turn on considerations particular to New Jersey, but rather on considerations that apply with equal force to a nation-to-nation comparison. The "particular circumstances," *id.* at 14a, on which the district court and court of appeals focused included the following: (i) the Petitioners are Dutch residents acting on behalf of a Dutch corporation and are already immersed in Dutch bankruptcy proceedings involving the corporation, *id.* at 15a; (ii) the Netherlands has substantial associations with — and interest in — this case, including ongoing, related proceedings, *id.* at 20-21a; (iii) numerous witnesses and potentially responsible parties reside in the Netherlands, *id.* at 23a; (iv) proceeding in the Netherlands would permit defendants to pursue contribution claims against other potentially responsible foreign entities, *id.* at 25a; (v) Petitioners primarily assert claims under Dutch law,[9]

---

[9] Indeed, given the practical nature of the *forum non conveniens* analysis, *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988), it is appropriate to note that the only claims potentially triable in this case are the alleged violations of Dutch statutes relevant to the internal operations of a Dutch corporation. Pet. App. at 21a. Although the lower courts assumed for purposes of their analysis the viability of Petitioners' RICO claim, that claim is barred by the PSLRA. *See* 18 U.S.C. § 1964(c); Pub. L. 104-67, § 107, 109 Stat. 737, 758 (1995) ("no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a [RICO violation]"). In the district court, Petitioners described their original complaint — which was amended but "asserted the same essential facts and claims as their original complaint," Pet. App. at 6a — in terms that leave no doubt that their claims were "actionable" as securities fraud and therefore could not support a RICO claim:

> In 125 detailed pages, the Complaint alleges . . . a massive financial fraud. The purpose of this fraud, insofar as it

id. at 21a; and (vi) any American interest in this case was only general and not compelling, *id.* at 22a. None of these factors turn upon whether the relevant forum is the United States as a whole or a particular state, and all demonstrate that, compared to the Netherlands, requiring defendants to litigate in any American forum would be inconvenient, oppressive, and vexatious. Petitioners' contrary assertion that the litigation was filed in the home state of two of the defendants, and hence must certainly be "convenient," Pet. at 19, was considered and rejected by both the district court and the Third Circuit based on their views of the facts of this case. Pet. App. at 15a, 25a, 72a, 81a. Petitioners' disagreement with those fact-bound, discretionary rulings does not merit review by this Court.[10]

> affected KPNQwest, was to artificially prop up the value of both Qwest and KPNQwest in order to ensure that Qwest's and KPNQwest's outrageously optimistic revenue projections could be concealed and *Qwest's and KPNQwest's inflated stock price preserved or enhanced.*

C.A. App. at JA-781 (emphasis added). Such facially defective American claims should not weigh in the *forum non conveniens* analysis. *See Dahl v. United Techs. Corp.*, 632 F.2d 1027, 1032 (3d. Cir. 1980) ("[T]he mere presence of a count pleaded under [American law] but which may have little chance of success does not warrant . . . a conclusion [that *forum non conveniens* dismissal is inappropriate]. If we were to hold otherwise, the plaintiffs could avoid dismissal on forum non conveniens grounds by the inclusion of a substantive count based on American law regardless of the merits of that claim.")

[10] *Cf., e.g., Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 74 (2d Cir. 2003) ("Bearing in mind that litigants rarely are concerned with promoting their adversary's convenience at their own expense, a plaintiff's choice of the defendant's home

Second, as a practical matter, the test applied by the Third Circuit required Respondents to make a showing of inconvenience sufficient to overcome the maximum level of deference required by this Court's *forum non conveniens* cases. In affirming the district court's finding that the "balance of the public and private interest factors clearly favored dismissal," *id.* at 25a, the Third Circuit emphasized that:

> Although the Trustees' choice of forum was accorded a low degree of deference, the Defendants must nevertheless demonstrate that a *forum non conveniens* dismissal is warranted.
>
> * * *
>
> A defendant seeking dismissal on *forum non conveniens* grounds must show that the balance of the public and private factors "tips decidedly in favor of trial in the foreign forum." *Lacey v. Cessna Aircraft Co. ("Lacey II")*, 932 F.2d 170, 180 (3d Cir. 1991). "If, when added together, the relevant private and public interest factors are in equipoise, or even if they lean only slightly towards dismissal, the motion to dismiss must be denied." *Id.*

Id. at 17a-18a.

---

forum over other fora where defendant is amenable to suit and to which the plaintiff and the circumstances of the case are much more closely connected suggests the possibility that plaintiff's choice was made for reasons of trial strategy.").

The "tips decidedly" standard of *Lacey II* applied below more than meets the standard this Court has articulated for cases involving foreign plaintiffs. In *Piper*, for example, this Court held that a finding that "trial in the plaintiff's chosen forum would be burdensome . . . is sufficient to support dismissal on grounds of *forum non conveniens*." 454 U.S. at 259.

In fact, the *Lacey II* standard is essentially the standard used by this Court and by other circuits in evaluating *forum non conveniens* challenges to lawsuits by American citizens residing in the U.S. *See, e.g., Piper*, 454 U.S. at 255 ("there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public factors *clearly point* towards trial in the alternative forum") (emphasis added); *Mercier II*, 935 F.2d at 423-24 (party moving for dismissal of U.S.-resident, American citizen's claims must establish "that considerations of convenience and judicial efficiency *strongly favor* litigating the claim in the second forum") (emphasis added).

A finding, as here, that the balance of the public and private interest factors "tipped decidedly toward trial in the Netherlands," Pet. App. at 18a, suffices to overcome even the deference owed a U.S.-resident, American plaintiff. As this Court observed in *Piper*:

> Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be

> unnecessarily burdensome for the defendant or the court, dismissal is proper.

454 U.S. at 255 n.23.

The lower courts' conclusions that the balance "tips decidedly" in favor of trial in the Netherlands turned on factors unaffected by whether the relevant comparison looks to New Jersey or to the United States as a whole. The determination that these Dutch plaintiffs — who made no effort to show their choice of forum was driven by convenience as opposed to more traditional forum-shopping — were entitled to less deference was neither erroneous nor the determining factor below. This Court should not grant review to consider a question that will have no bearing on the judgment below.

III. THERE IS NO POLICY REASON FOR THIS COURT TO GRANT REVIEW.

Although they stop short of a frontal attack on the *forum non conveniens* doctrine, Petitioners and their *amici*[11] assert that this Court should rein in the

---

[11] Neither *amicus* brief complied with this Court's Rule 37, since, as the letters filed by the *amici* with the Clerk show, the individual Respondents were not asked for, and consequently did not grant, their consent to the filing.

Nor should this Court consider the amicus briefs to be evidence of broad interest in the question presented by the Petition for several reasons. First, Petitioners "made a monetary contribution" to INSOL Europe's brief. Br. of INSOL Europe at 1, n.1. Second, Rutger Schimmelpennink, a current member of INSOL Europe's board and its Immediate Past President, is Petitioners' law partner at the Houthoff Buruma firm, which also

doctrine to ensure that international plaintiffs are not discouraged from suing in our courts. This Court has previously rejected that speculative line of reasoning and should do so here as well.

Petitioners and their *amici* present no empirical evidence to support their professed concern. Nor can they. There is no reason to conclude that an occasional *forum non conveniens* dismissal — this case marks the first time that the Third Circuit has affirmed such a dismissal since 1980 — will call into doubt the continued truth of Lord Denning's observation that "[a]s a moth is drawn to the light, so is a litigant drawn to the United States." *Smith Kline & French Labs. Ltd. v. Bloch*, (1983) 1 W.L.R. 730, 733 (Eng. C.A.). And in *American Dredging*, this Court rejected the argument that such speculative concerns about the potential reactions of future litigants to the doctrine's application justified curtailing its flexibility:

> [T]o tell the truth, *forum non conveniens* cannot *really* be relied upon in making decisions about secondary conduct — in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application make

---

represents Petitioners in the Netherlands, *see* INSOL-Europe Executive, Council & Secretariat, http://www.insol-europe.org/aboutus/executivecouncil.cfm (last visited Nov. 26, 2008); Houthoff Buruma, http://www.houthoff.com/index.php?id=122&suggest=kpnqwest&t=6 (last visited Nov. 26, 2008). And third, the Kingdom of the Netherlands expressed only a narrow — and, as explained below, misplaced — concern about a treaty that Petitioners did not raise in the district court.

> uniformity and predictability of outcome almost impossible. "The *forum non conveniens* determination," we have said, "is committed to the sound discretion of the trial court." . . . In such a regime, one can rarely count on the fact that jurisdiction will be declined.

510 U.S. at 455. (Emphasis in original; citations omitted).

This Court should likewise reject INSOL Europe's suggestion that this Court should reexamine *Piper*'s holding that a foreign plaintiff's forum choice warrants less *presumptive* deference than that of a U.S.-resident, American plaintiff.[12] The suggestion that the *forum non conveniens* doctrine poses a "virtually insuperable barrier to foreign plaintiffs in the United States," INSOL Br. at 11, cannot be squared with decades of experience suggesting that a dearth of foreign plaintiffs is not now, nor is likely to become, a significant problem for our courts.[13]

---

[12] INSOL Europe insinuates that this aspect of the *Piper* holding merits reconsideration because it only "represent[s] the plurality view of four Justices." INSOL Br. at 11. But the *majority* opinion in *Piper* was just that, a majority opinion — and one which this Court unanimously cited with approval just last Term. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 127 S.Ct. 1184, 1191 (2007) ("When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor 'applies with less force,' for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'" (*quoting Piper Aircraft Co.*, 454 U. S. at 255-56).

[13] *Cf., e.g., Morrison v. Nat'l Australia Bank Ltd.*, __ F.3d. __, No. 07-0583-cv, 2008 WL 4660472, at * 4 (2nd Cir. Oct. 23, 2008) ("Here, a set of (1) *foreign* plaintiffs is suing (2) a *foreign* issuer in

Neither Chapter 15 of the Bankruptcy Code nor the Treaty of Friendship, Commerce, and Navigation between the United States and the Netherlands (the "FCN Treaty") undercuts the Third Circuit's decision or otherwise necessitates review.

It is somewhat unclear whether Petitioners claim that Chapter 15 somehow applies to this case or only that it suggests public policy concerns that should alter the normal workings of the *forum non conveniens* doctrine. Either position would be wrong. First, Chapter 15 does not apply to this case because Petitioners never commenced an ancillary case under the chapter as required under 11 U.S.C. §§ 1504, 1509(a).[14] Second, Petitioners cite no cases, statutory text or legislative history supporting their position that the amendments to Chapter 15 should be read to alter the application of the *forum non conveniens* doctrine. Nor can they; Chapter 15 and the cases and commentary interpreting it establish that Congress intended only to facilitate cross-border insolvencies. Pet. App. at 91a-97a. This case does not implicate that Congressional concern, particularly because, in view of

---

an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries."). (Emphasis in original).

[14] Chapter 15 does not apply in any event. This case was filed in June 2004, Pet. at 5, more than a year before the Act's effective date. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8 § 1501, 119 Stat. 23, 216 (2005) ("this Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act"; "the amendments made by this Act shall not apply with respect to cases commenced under Title 11, United States Code, before the effective date of this Act").

the lower courts' uncontested finding that the Netherlands is an adequate alternative forum, *id.* at 11a n.3, there is no need for the sort of "assistance" from American courts that Chapter 15 contemplates. Finally, Chapter 15 itself expressly rejects the notion that it displaces or modifies generally applicable *forum non conveniens* law. *See* 11 U.S.C. § 1509(e) ("a foreign representative is subject to applicable nonbankruptcy law").

The FCN Treaty between the United States and the Netherlands similarly provides no reason for this Court to grant review. Petitioners misstate, and their *amici* therefore misunderstand, the state of the record on this issue. Contrary to Petitioners' assertion, Pet. at 8, the district court did not "hold" that there was no FCN treaty; it merely stated that it was "aware of no [FCN treaty]." Pet. App. at 57a n.14. That is because Petitioners did not raise the issue in the district court. *Id.* ("Plaintiffs similarly do not assert that, under any [FCN] treaty, Plaintiffs qualify for 'national access'"). Petitioners now assert that a copy of the treaty is "in the record of this case," implying either that the district court misread the record or that Petitioners *did* raise the issue. Pet. at 8. Neither implication is correct. Petitioners submitted the copy of the treaty "in the record of this case" in connection with a later-filed motion, which the district court never reached because the *forum non conveniens* dismissal mooted it. *See* Pet. App. at 97a ("Defendants' Motion to Compel Plaintiffs to Post a Security Bond, Docket Entry 77, will be denied as moot"). This case is therefore not an appropriate vehicle to address the issue.

Even if the issue had been properly raised below, however, it would not be a reason to grant review.

Petitioners and their *amici* correctly assert that the FCN Treaty guarantees Dutch citizens the same treatment as American citizens in the *forum non conveniens* analysis. But they err in assuming that all American citizens — regardless of where they reside — automatically receive the highest level of deference as to their forum choice. In fact, as the Second Circuit has explained, there is no merit to Petitioners' "assertion that [an FCN] treaty would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition impermissibly conflates citizenship and convenience, and assigns an artificial weight to citizenship." *Pollux Holding*, 329 F.3d at 73.

The forum choice of expatriate Americans — and non-resident foreigners enjoying "national access" treaty rights — has long been accorded less *presumptive* deference than that of U.S.-resident American citizens. *See, e.g., id.* ("[Plaintiffs claiming 'national access' treaty rights] cannot successfully lay claim to the deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, *at best*, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum.") (emphasis added); *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73 n.5 (2d Cir. 2001) (*en banc*) ("When [an earlier Second Circuit opinion] spoke of the deference due to the choice of forum by U.S. 'citizens,' we understand those references to signify citizens who were also U.S. residents, rather than situations in which an expatriate U.S. citizen residing permanently in a foreign country brings suit in the United States. As to such suits, it would be less reasonable to assume the choice of forum is based on convenience.") (citation

omitted)[15]; *Pain*, 637 F.2d at 797 ("the factor of American citizenship per se proves largely irrelevant to the factors which [the Supreme Court] required courts to consider when making forum non conveniens determinations. At best, citizenship serves as an inadequate proxy for the American residence of plaintiff, which in turn is only one indicator of how inconvenient it may be for the plaintiff to litigate his case in a foreign forum . . . "); *cf. Reid-Walen*, 933 F. 2d at 1395 ("When an American corporation doing extensive foreign business brings an action for injury occurring in a foreign country, many courts have partially discounted the plaintiff's United States citizenship.")

---

[15] Responding to the Second Circuit's invitation, the Department of Justice, speaking on behalf of the State Department and the Office of the Solicitor General, addressed the significance of "national access" treaties in the *forum non conveniens* context by noting, among other things, that "'the Supreme Court has already made clear that the fact that the plaintiff is a citizen or resident of the United States is relevant but not dispositive in a forum non conveniens analysis'" and that "'any right to court access afforded to a foreign national plaintiff by treaty will generally be only a right to the same access that would be accorded to a U.S. national plaintiff who is otherwise similarly situated.'" *Iragorri*, 274 F.3d at 69 n.2 (*quoting* Letter from Att'y Michael J. Singer, Appellate Staff, Civil Div., U.S. Dep't of Justice, to Roseann B. MacKechnie, Clerk of Court (May 15, 2001)).

CONCLUSION

The Petition should be denied.

Respectfully submitted.

Jonathan Sherman*
Jonathan M. Shaw
Dean Kawamoto
Melissa B. Felder
Boies, Schiller & Flexner LLP
5301 Wisconsin Avenue, N.W.
Washington, D.C. 20015-2015
(202) 237-2727

**Counsel of Record*
Counsel for Respondent
Qwest Communications
International Inc.

Ira A. Finkelstein
Harnik Wilker & Finkelstein LLP
645 Fifth Avenue
Suite 703
New York, NY 10022-5937
(212) 599-7575

Counsel for Respondent
John A. McMaster

Jeffrey E. Gross
Vandenberg & Feliu
110 East 42nd Street
Suite 1502
New York, NY 10017
(212) 763-6800

Counsel for Respondent
Robert S. Woodruff

Herbert J. Stern
Jeffrey Speiser
Joel M. Silverstein
Stern & Kilcullen, LLC
75 Livingston Avenue
Roseland, NJ 07068
(973) 535-9664

Counsel for Respondent
Joseph P. Nacchio